
No. SC83890

IN THE
SUPREME COURT OF MISSOURI

CARLOS DUPREE, et al.,

Plaintiffs/Appellants,

v.

BLAKE LAMBOURNE, et al.,

Defendants/Respondents.

Appeal from the Circuit Court of the City of St. Louis, Missouri,
Case No. 972-08371
The Honorable Robert H. Dierker, Jr., Circuit Judge
Upon Direct Transfer from the Eastern District Court of Appeals

BRIEF OF STATE ATTORNEY GENERAL
as AMICUS CURIAE

JEREMIAH W. (JAY) NIXON
Attorney General

ALANA M. BARRAGÁN-SCOTT
Missouri Bar No. 38104
Deputy State Solicitor

Post Office Box 899
Jefferson City, Missouri 65102
Phone: (573) 751-3321

ATTORNEYS FOR AMICUS CURIAE

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Argument

Appellant/Plaintiff Dupree argues that the tolling provision contained in the statute of limitations at issue in this case, §537.100, RSMo 1994,¹ is constitutional and preserves his cause of action. Relying in part on *Poling v. Moitra*, 717 S.W.2d 520 (Mo. banc 1986), Dupree also argues that the statute must be read in isolation and that the long-arm statute, §506.510, does not apply. Dupree argues in the alternative that if §537.100's tolling provision is unconstitutional, then the wrongful death statutory scheme must be declared void in its entirety. *See* Appellant's Substitute Brief, Points I, III and IV.

Respondent/Defendant Zenith argues that applying the tolling provision to it, under the instant circumstances, would violate the Commerce Clause of the United States Constitution. Zenith also argues that any offending language can be severed from the rest of the statute. *See* Respondent's Substitute Brief, Points III and IV.

¹ All statutory references are to RSMo 1994, unless otherwise indicated.

Amicus does not wholly agree with either party, whether with their conclusions, or in some respects, with their analyses. With respect to their conclusions, amicus agrees with Dupree that the statute is constitutional; amicus also agrees with Zenith that Dupree cannot invoke tolling in this case. With respect to the legal analysis, if this Court reaches the issue of the validity of the tolling provision contained in §537.100,² then it should hold that the tolling provision is constitutional both on its face and as applied, and overrule *Poling v. Moitra*, 717 S.W.2d 520 (Mo. banc 1986), to the extent that the case can be read to construe such a tolling provision in an unconstitutional manner. In the alternative, if this Court holds that the tolling provision offends the Commerce Clause, then this Court should hold that the provision is severable and leave intact the rest of §537.100.

1. Plain language analysis supports the trial court's

² If the Court determines that Zenith waived the defense of expiration of the statute of limitations as a defense, by failing to timely assert it (as addressed in the parties' respective Points II), then the Court need not address the validity of the tolling provision. Amicus does not take a position with regard to the waiver issue.

dismissal.

As this is a case brought under Missouri's wrongful death statute, §537.080.1, the applicable statute of limitations is set forth in §537.100:

Every action instituted under section 537.080 shall be commenced within three years after the cause of action shall accrue; provided, that if any defendant, whether a resident or nonresident of the state at the time any such cause of action accrues, shall then or thereafter be absent or depart from the state, so that personal service cannot be had upon such defendant in the state in any such action heretofore or hereafter accruing, the time during which such defendant is so absent from the state shall not be deemed or taken as any part of the time limited for the commencement of such action against him.... (emphasis added)

The Court's role in interpreting statutes is to "'ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning.'" *Budding v. SSM*

Healthcare System, 19 S.W.3d 678, 680 (Mo. banc 2000), *quoting* *State ex rel. Riordan v. Dierker*, 956 S.W.2d 258, 260 (Mo. banc 1997). Plain language is the starting point of statutory analysis. *L & R Egg Co. v. Director of Revenue*, 796 S.W.2d 624, 625 (Mo. banc 1990).

The underlined language, indicated in the statute set forth above, provides that if a would-be defendant, whether a resident or non-resident at the time a cause of action accrues, is subsequently absent from or departs from the state for whatever reason – so that the defendant cannot be personally served in the state – then the time for commencement of the cause of action does not run. Zenith does not appear to argue that it *could* have been served within Missouri; simply that it *was not*.

³ Applied to the facts of this case, the plain language of the statute dictates that the time for commencement of the cause of

³ Dupree notes in its statement of facts, and Zenith does not appear to dispute, that Zenith is a Florida corporation that has never had a registered agent in Missouri. Appellant’s Substitute Brief, pp. 9, 14. Zenith argues that it could have been served “under the foreign corporation statute, §351.594, RSMo” as well as the long-arm statute. Respondent’s Substitute Brief, p. 14. Presumably, Zenith refers to §351.594.2(1) – the subsection that applies to a foreign corporation lacking a registered agent in Missouri.

action against Zenith - which was outside the state after the cause of action accrued and could not be served within the state - was tolled.

Amicus agrees with Zenith that the tolling provision implies some kind of link - between a defendant's departure or absence from the state, and the inability of a plaintiff to serve the defendant - by the provision's use of the linking phrase, "so that." But amicus disagrees with Zenith that the use of "so that" means the tolling language can only apply where the defendant "intentionally avoid[s] service by being absent from or departing from the state." Respondent's Substitute Brief, p. 19. The applicability of the tolling provision does not hinge on some nefarious intent. The statute is framed more simply, hinging on the inability of a plaintiff to gain personal service within the state, presumably for whatever reason.

Zenith also argues that service "in the state," as the phrase is used in the statute, can be accomplished by invocation of the long-arm statute. Respondent's Substitute Brief, pp. 14-15. Amicus agrees. Section 506.510.1 indicates that where long-arm service is had on an agent of a foreign corporation, such service

shall have the force and effect as though
process had been served within this state.

Amicus recognizes the argument that the tolling provision is framed in terms of a defendant's presence in and subsequent departure or absence from the state; such language can be read to imply that it is the physical location of a defendant that drives the tolling analysis and that "force and effect" simply is not sufficient. See Appellant's Substitute Brief, p. 16.

But the better interpretation is to read the plain language of §506.510 in conjunction with §537.100: Read together, the statutes strongly suggest that when a plaintiff can achieve service of an out-of-state defendant corporation via the long arm statute, then the plaintiff cannot take advantage of the tolling provision of §537.100 - because the out-of-state defendant can be served with the same force and effect as if it had been served "in the state." The purpose behind any tolling provision that is applicable in the case of an out-of-state defendant - particularly a tolling provision enacted in the era before the internet or long-arm statutes came into existence - is to ensure that a plaintiff has a reasonable chance to locate that out-of-state defendant. See Section B, below.

Moreover, reading §506.510 together with §537.100 permits the Court to give effect to both statutes, and as Dupree points out, the legislature is not intended to have done a useless act.

Appellant's Substitute Brief, p. 20 (*citing Murray v. Mo. Hwy. & Transp. Comm'n*, 37 S.W.3d 228 (Mo. banc 2001)).

Reading the provisions together may also require the Court to reexamine *Poling v. Moitra*, 717 S.W.2d 520 (Mo. banc 1986), a case suggesting that tolling provisions should not be read in conjunction with the long arm statute. *Poling* is discussed below.

1. The tolling provision should not be construed in such a way as to violate the Commerce Clause.

The United States District Court, Eastern District of Missouri, has recently held a very similar Missouri statute, §516.200, RSMo 1994,⁴ a statute that contains tolling language

⁴ Section 516.200 states in relevant part:

If at anytime when any cause of action herein specified accrues against any person who is a resident of this State, and he is absent therefrom, such action may be commenced within the times herein respectively limited, after the return of such person into the state; and if, after such cause of action shall have accrued, such person depart from and reside out of this state, the time of his absence shall not be deemed or

similar to that of §537.100 - unconstitutional on its face. *Rademeyer v. Farris*, 145 F. Supp. 2d 1096 (E.D. Mo. 2001).⁵ That case is now being briefed in the United States Court of Appeals for the Eighth Circuit, case nos. 01-2377 and 01-2456 (consolidated). Much as the Eighth Circuit had held in *Bottineau Farmers Elevator v. Woodward-Clyde Consultants*, 963 F.2d 1064 (8th Cir. 1992), when it examined and rejected a Nebraska tolling statute on Commerce Clause grounds, so the district court held in *Rademeyer* that the tolling provision of §516.200 violates the Commerce Clause. Specifically, the court in *Rademeyer* held that "Missouri cannot justify its statute [§516.200], because the statute is applicable [even] when the State has long-arm jurisdiction over the defendant." 145 F. Supp. 2d at 1106.

taken as any part of the time limited for the commencement
of such action.

⁵ Though not a party at the time the plaintiff initially filed suit, the State received notice and the opportunity to intervene after the parties had engaged in discovery, and after they had fully briefed the defendant's motion for summary judgment. The State did intervene. 145 F. Supp. 2d at 1099.

In the Eighth Circuit, the State argues that the district court incorrectly held the statute unconstitutional. Indeed, amicus agrees with Dupree that §537.100 (the statute at issue in the instant case) can be distinguished from §516.200 (the statute that the federal court struck in *Rademeyer*). And amicus agrees with Dupree that §537.100 should pass constitutional muster in a Commerce Clause analysis.⁶ But it takes little prescience or even imagination to foretell the likely outcome of a Commerce Clause challenge to §537.100 in a federal court in Missouri, at least in view of the present state of the law.

The key to understanding *Rademeyer* may be to note that the district court believed this Court's opinion in *Poling v. Moitra*, 717 S.W.2d 520 (Mo. banc 1986), to be an insurmountable obstacle to any attempt to reconcile the long-arm statute with the tolling provision in a constitutional manner. 145 F. Supp. 2d at 1106 and n.5. The parties to the instant proceeding and, to some extent, the eastern district of the court of appeals,

⁶ To this extent, amicus adopts Dupree's arguments, contained in Point III of his Substitute Brief, regarding the constitutionality of the statute.

also struggled with *Poling*. The instant case presents an opportunity to this Court to revisit *Poling*, a visit that appears particularly appropriate in view of a relevant U.S. Supreme Court case, decided two years after *Poling*: *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 108 S.Ct. 2218, 100 L.Ed.2d 896 (1988).

Though the Court in *Bendix* framed its analysis of an Ohio tolling statute⁷ in terms of the “particular facts of the case

⁷ The Ohio tolling statute, Ohio Rev. Code Ann. §2305.15 (Supp. 1987), provided:

When a cause of action accrues against a person, if he is out of state, has absconded, or conceals himself, the period of limitation for the commencement fo the action as provided in sections 2305.04 to 2305.14, 1302.98, and 1304.29 of the Revised Code, does not begin to run until he comes into the state or while he is so absconded or concealed. After the cause of action accrues if he departs from the state, absconds, or conceals himself, the time of his absence or concealment shall not be computed as any part of a period within which the action must be brought.

before" it, 486 U.S. at 894, 108 S. Ct. at 2222, its analysis appears to have been, in the main, *gratis* : "The Ohio statute before us might have been held to be a discrimination that invalidates without extended inquiry," 486 U.S. at 892, 108 S. Ct. at 2221.

The Court in *Bendix* was concerned that the burden placed on a foreign corporation by the tolling statute was too high. The Ohio statute required a foreign corporation - if it wished to avoid tolling of a cause of action by its absence from Ohio - to appoint an agent in Ohio for service of process in all cases and to defend itself in all matters, even those in which it lacked minimum contacts. 486 U.S. at 892-893; 108 S. Ct. at 2221. That Ohio could end-run due process is obviously a significant burden on a foreign corporation and difficult to justify. *Id* (citing *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987)). The court held that Ohio could not justify a tolling distinction between in- and out-of-state defendants, and that the tolling provision violated the Commerce Clause. 486 U.S. at 894-895, 108 S. Ct. at 2222.

The Eighth Circuit in *Bottineau* disposed of an analogous Nebraska tolling statute⁸ four years later, on *Bendix* grounds,

⁸ The North Dakota statute, N.D. Cent. Code § 28-01-32 (1974), provided in

pertinent part:

If any person shall be out of this state at the time a cause of action accrues against him, an action on such cause of action may be commenced in this state at any time within the term limited in this chapter for the bringing of an action on such cause of action after the return of such person into this state.

If any person shall depart from and reside out of this state

holding that Nebraska could not constitutionally justify its tolling statute's distinction between resident and non-resident defendants. 963 F.3d at 1074. After determining that the Nebraska long-arm statute would not apply to avoid the tolling statute, the circuit court held that the tolling statute placed "a significant burden on interstate commerce because it forces a non-resident defendant to choose between being physically present in the state for the limitations period or forfeiting the statute of limitations defense." *Id.*

Many other courts have reached the same conclusion in

and remain continuously absent therefrom for the space of one year or more after a cause of action shall have accrued against him, the time of his absence shall not be taken as any part of the time limited for the commencement of an action on such cause of action.

analyzing Commerce Clause challenges to various states' tolling statutes, particularly where a state has an applicable long-arm statute. Kenneth J. Rampino, *Tolling of Statutes of Limitations During Absence from State as Affected by Fact That Party Claiming Benefit of Limitations Remained Subject to Service During Absence of Nonresidence*, 55 A.L.R.3d 1158, 1163 §2(a)(stating that of the courts that have considered effect of amenability of service on tolling, a majority of those courts have refused to give application to tolling provision, where party claiming benefit of limitations remained amenable to personal jurisdiction).

As mentioned above, the United States District Court in *Rademeyer* believed that this Court's decision in *Poling* compelled its conclusion that the tolling provision of §516.200 violates the Commerce Clause. *Poling*, decided two years before *Bendix*, stands for the proposition that a Missouri Court should enforce a tolling provision where a defendant is out of state - even if the plaintiff can achieve service via Missouri's long-arm statute, §506.500. The Court in *Poling* believed that to decline to uphold the tolling statute, based on the long-arm statute, "would be plain judicial legislation." 717 S.W.2d at 522.

In terms of the instant case, if this Court were to hold

that §506.510 cannot be read in conjunction with §537.100, foreclosing tolling under these facts by a plain language interpretation of the statutes, then *Poling* would appear to compel the conclusion that Dupree in essence urges: tolling is tolling, and availability of long-arm service has no relevance to the question of whether a cause of action is tolled. See Appellant's Substitute Brief, pp. 16-17. This Court should not draw the same conclusion today.

First, and as mentioned in Section A, above, the legislature enacted the long arm statute in 1967, long after the tolling provisions of both §516.200 and §537.100 came into existence, in about 1879 and 1909, respectively. See *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 167 (Mo. banc 1999)(discussing enactment of §506.500); and §3236, RSMo (1879) and §5429, RSMo (1909). The legislature is presumed to have intended to effect some change in the law when it enacts new legislation. *E.g.*, *Murray v. Mo. Hwy. & Transp. Comm'n*, 37 S.W.3d 228 (Mo. banc 2001)

The intent of the General Assembly in enacting the long arm statute "'was to extend the jurisdiction of the courts of this state over nonresident defendants to the extent permissible under the due process clause of the fourteenth amendment of the constitution of the United States,'" and to "expand the reach of

the law of the state to authorize jurisdiction over foreign corporations that are not necessarily authorized to do business in the state but whose activities justify personal jurisdiction." *State ex rel. K-Mart*, 986 S.W.2d at 167-168 (quoting *State ex rel. Deere and Co. v. Pinnell*, 454 S.W.2d 889, 892 (Mo. 1970)). In terms of the instant case, it was the intent of the General Assembly that Zenith, though out of state, be subject to the reach of Missouri law.⁹

⁹ Notably, Dupree admits in his Substitute Brief, p. 31, that Zenith "regularly conducts business in" this state. The regular conduct of business, in conjunction with the commission of a tort (the delivery of an allegedly dangerous drug into the state), appears to be sufficient nexus with the state to justify the assertion of personal jurisdiction over Zenith in a Missouri court. *State ex rel. Nixon v. Beer Nuts, Ltd.*, 29 S.W.3d 828, 835 (Mo. banc 2000).

The Southern District harmonized the long arm statute with a tolling provision contained in a general statute of limitations, §516.120(5), in *Williams v. Malone*, 590 S.W.2d 879 (Mo. App. SD 1980). The court in *Williams* noted that the "basic policy" behind a statute of limitations is to ensure that "causes of action are to be presented before memories fade and evidence becomes obscure," while the "purpose of [a] tolling statute is to prevent the applicable statute of limitations from running when the courts of this state cannot acquire effective jurisdiction of the defendant." 590 S.W.2d at 882.

Accordingly, when delay is not necessary for the purpose of securing effective jurisdiction of a foreign defendant, the "reason for suspending the statute of limitations does not exist.'" *Id* (citing *Haver v. Bassett*, 287 S.W.2d 342, 345 (Mo. App. 1956)). Conversely, the court implies, when a foreign defendant is not amenable to service, a reason would exist to invoke tolling. To hold otherwise, said the court of appeals, would permit a plaintiff to postpone presentation of a claim indefinitely, 592 S.W.2d at 882, a result that would, at minimum, promote the filing of stale claims - the antithesis of the purpose behind any statute of limitations.

Williams represents a sound construction of Missouri's long arm statute in conjunction with Missouri's various statutes of

limitations and tolling provisions - a construction that permits the courts to effectuate the legislature's intent behind all of the statutes. This Court should reject its holding in *Poling*, and embrace the court of appeals' holding in *Williams*.

Second, this Court's holding in *Poling* is problematic because it invites the federal courts, in this post-*Bendix* era, to declare various Missouri tolling provisions unconstitutional.

See Henry M. Pogorzelski, Note, *For Whom Does the Statute Toll? Serious Concerns About Our Antiquated Texas Tolling Statute*, 17 Rev. Litig. 589, 608 (1998)(applying judicial limitation on tolling where long-arm statute is available "would preserve the statute's applicability, as against truly unamenable defendants, from potential wholesale invalidation by constitutional attack"). This Court did not have the instruction of *Bendix* when it decided *Poling*, inasmuch as the case came two years later. A court should construe Missouri's laws so as to avoid constitutional difficulties. *General Motors Corp. v. Director of Revenue*, 981 S.W.2d 561, 566 (Mo. banc 1998). If this Court were to hold that Missouri's tolling provisions should be read in conjunction with the long-arm statute, such a construction could avoid the constitutionality of Missouri's tolling provisions, including the tolling provision in the instant case, from being called into question.

Moreover, such a construction would bring Missouri into line with what has been described as the majority of jurisdictions that have addressed the question. 55 A.L.R.3d 1158, §2(a), *supra*; Stephen R. Smoak, *Annual Survey of South Carolina Law*, 50 S.C.L. Rev. 861, 861-862 (1999)(majority of jurisdictions have amended or judicially construed their tolling statutes to prevent application against out-of-state defendants, where such defendants remain amenable to service).

2. In the alternative, the tolling language can be severed.

In the alternative, if the Court finds a constitutional infirmity in the tolling provision of §537.100, amicus agrees with Zenith that the tolling language can be excised without striking the wrongful death statutory scheme in its entirety, as Dupree urges. See Appellant's Substitute Brief, Point IV. Amicus adopts Zenith's arguments in favor of severing the language, found in Respondent's Substitute Brief, Point IV.

Conclusion

This Court should hold that the tolling provision contained in §537.100 is constitutional, but that it does not apply in this case.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

ALANA M. BARRAGÁN-SCOTT
Missouri Bar No. 38104
Deputy State Solicitor

P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-3321

Attorneys for Amicus Curiae

Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 9th day of October, 2001, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Richard G. Byrd
Suelthaus & Walsh, P.C.
7733 Forsyth Boulevard - Twelfth Floor
St. Louis, Missouri 63105
Attorneys for Plaintiffs/Appellants

G. Keith Phoenix
Sandberg, Phoenix & Von Gontard
One City Center
515 North Sixth Street, 15th Floor
St. Louis, Missouri 63101
Attorneys for Defendant Zenith Goldline Pharmaceuticals, Inc.

Ann Verrett
Armstrong, Teasdale, L.L.P.
One Metropolitan Square, Suite 2600
St. Louis, Missouri 63102-2740
Attorneys for SSM Health Care Central Region d/b/a St. Mary's Health Center

Melanie Tamsky
Brown & James, P.C.
705 Olive Street, 11th Floor
St. Louis, Missouri 63101
Attorneys for Defendant Dr. Blake Lambourne

The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 3584 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

ALANA M. BARRAGÁN-SCOTT